

# **ADDENDUM**

**Addendum**

Washington's Public Disclosure and Open Public Meetings Laws  
Deskbook, 2006, Chapter 12, Pages 12-1 through 12-4 ..... A1-4

## CHAPTER 12

### “OTHER STATUTE” EXEMPTIONS FROM DISCLOSURE

Kristal K. Wiitala

#### Summary

§12.1 Interpretation and Application

§12.2 Laws Other than State Statutes

§12.3 Redaction of Records Exempt under Other Statutes

**Appendix:** PRA “Other Statutes”

#### §12.1 INTERPRETATION AND APPLICATION

RCW 42.17.260(1)/**RCW 42.56.070(1)** is the source for the hundreds of “other statute” exemptions to the Public Records Act (PRA). In addition to the broad list of exemptions from disclosure (in RCW 42.17.310/**RCW 42.56.230 - .480**) and the quirky array of statutes applying to specific types of records (between RCW 42.17.312 and 42.17.31918/**RCW 42.56.240 and 42.56.400**), the Legislature in RCW 42.17.260(1)/**RCW 42.56.070(1)** creates a PRA exemption for any “other statute which exempts or prohibits disclosure of specific information or records.”

An agency is required to publish and keep a list of all laws that it believes would exempt or prohibit disclosure of any records held by the agency. RCW 42.17.260(2)/**RCW 42.56.070(2)**; *see also* WAC 44-14-06001. If a requestor brings a court action to challenge denial of a record, the agency has the burden of proving that the refusal of access is consistent “with a statute that exempts or prohibits disclosure in whole or in part of specific information or records.” RCW 42.17.340(1)/**RCW**

---

Kristal K. Wiitala was appointed in 2001 as the Public Records and Privacy Officer for the Washington State Department of Social and Health Services, responsible for the coordination of public records disclosure and privacy issues among over 250 public disclosure officers. Previously, she served as a DSHS Review Judge, starting in 1984, and earlier worked in private practice and other agencies after graduating from University of Washington School of Law and Washington State University. She is a former Administrative Law Section Trustee and was elected to the WSBA Board of Governors in 2005.

### §12.1 / “Other Statute” Exemptions from Disclosure

**42.56.550(1).** The PRA must be liberally construed and will govern if in conflict with any other Act. RCW 42.17.920. See also chapter 6, Statutory Construction of the Act.

The Supreme Court described the interface of the “other statute” exemption with the rest of the PRA in *Progressive Animal Welfare Society v. University of Washington (PAWS II)*, 125 Wn.2d 243, 261-62, 884 P.2d 592 (1994):

The “other statutes” exemption incorporates into the Act other laws that exempt or prohibit disclosure of specific information or records. RCW 42.17.260(1). In other words, if such other statutes mesh with the Act, they operate to supplement it. However, in the event of a conflict between the Act and other statutes, the provisions of the Act govern. RCW 42.17.920. Thus, if another statute (1) does not conflict with the Act, and (2) either exempts or prohibits disclosure of specific public records in their entirety, then (3) the information may be withheld in its entirety notwithstanding the redaction requirement. The rule applies only to those exemptions explicitly identified in other statutes; its language does not allow a court “to imply exemptions but only allows specific exemptions to stand.” *Brouillet v. Cowles Publ’g Co.*, 114 Wn.2d 788, 800, 791 P.2d 526 (1990).

To prohibit disclosure or to exempt records from inspection or copying, the “other statute” must specifically exempt information from disclosure. A general reference that does not specifically make the records confidential or exempt is not sufficient to apply as an exception to the general policy of open records. *Brouillet*, 114 Wn.2d at 800.

The court in *PAWS II* expressly refrained from deciding whether a statute outside the PRA is in conflict if it overlaps with or incorporates an exemption provided in the Act. *PAWS II*, 125 Wn. 2d at 262 n.10. Accordingly, the many statutory provisions dealing with confidentiality or protection of information held by public agencies must be individually reviewed and compared with the PRA to determine if they exempt records from disclosure in whole or in part. Many of these provisions have not been interpreted or applied by appellate courts.

The state Supreme Court has recently addressed the attorney-client privilege statute of RCW 5.60.060(2) and incorporated it as an “other statute” to exempt records from disclosure. *Hangartner v. City of Seattle*, 151 Wn.2d 439, 453, 90 P.3d 26. The court rejected arguments that the privilege statute did not apply to agencies but instead to attorneys and that it did not specifically exempt information from disclosure. 151 Wn. 2d at 458 (Johnson, J. dissenting). The court held that an “other statute” need not mesh with the PRA and could overlap a PRA exemption (the controversy exemption in RCW 42.17.310(1)(j)/**RCW 42.56.290**) but

### **“Other Statute” Exemptions from Disclosure / §12.2**

that this particular statute was clearly and plainly incorporated into the PRA by RCW 42.17.260(1)/**RCW 42.56.070(1)**. *Id.* at 452. Because the attorney-client privilege statute was on the books at the time the Legislature adopted the “other statute” amendment to the PRA, the court stated it could have excepted this law from being incorporated if that was its intent. *Id.* at 453.

There is some additional guidance by the courts on how to interpret a non-PRA “other statute” when determining whether it exempts records from disclosure. In *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 580 P.2d 246 (1978), the agency invoked an “other statute” (RCW 84.40.020) as an exemption. The court held that when interpreting the other statute to determine if the records are exempt, “the overall policy” of the PRA “must be read into” the other statute. *Id.* at 139. This is consistent with RCW 42.17.251/**RCW 42.56.030**, which provides that exemptions to the PRA (thus including non-PRA “other statutes”) must be narrowly construed in favor of disclosure. It is also consistent with RCW 42.17.920, which provides that when a statute conflicts with the PRA, the PRA controls.

However, in a case involving the “other statute” addressing disclosure of child welfare records, the Court of Appeals held that the specific provisions of Chapter 13.50 RCW do not conflict with the openness provisions of the PRA, but its protection of the privacy of juvenile records qualifies it as an “other statute” under RCW 42.17.260(1)/**RCW 42.56.070(1)**. *Deer v. Dep’t of Soc. & Health Servs.*, 122 Wn. App. 84, 86, 93 P.3d 195 (2004). The court held that chapter 13.50 RCW “supplements the [PRA] and provides the exclusive process for obtaining juvenile justice and care records” which can be challenged under the procedures set in that law. *Id.* at 94. Whether specific procedural provisions of the PRA, not reflected in Chapter 13.50 RCW apply to fill in the gaps not covered by that law (such as the need to initially respond in five days) was not addressed by this court.

### **§12.2 LAWS OTHER THAN STATE STATUTES**

In addition to state statutes referenced in this section or listed in the Appendix, federal law may exempt information from disclosure under the PRA if it applies to the state agency and its records and it preempts state law under the following standards:

Federal preemption of state law may occur if Congress passes a statute that expressly preempts state law, if Congress preempts state law by occupation of the entire field of regulation or if the state law conflicts

### §12.3 / “Other Statute” Exemptions from Disclosure

with federal law due to impossibility of compliance with state and federal law or when state law acts as an obstacle to the accomplishment of the federal purpose.

*Wash. State Physicians Ins. Exch. & Ass’n v. Fisons Corp.*, 122 Wn.2d 299, 326, 858 P.2d 1054 (1993). The Washington Supreme Court has recognized that the federal Freedom of Information Act (FOIA) is not within the “other statute” provision. *Progressive Animal Welfare Soc’y v. Univ. of Wash. (PAWS II)*, 125 Wn.2d 243, 265, 884 P.2d 592 (1994). FOIA does not include a preemption provision and applies on its face only to federal agencies. *Id.* The court has also found that the public interest in access to copyrighted materials through a public disclosure request was a fair use not prohibited by federal copyright laws. *Lindberg v. Kitsap County*, 133 Wn.2d 729, 948 P.2d 805 (1997). An example of a federal law that “covers the field” affecting disclosure of records held by public agencies is the HIPAA Privacy statute and implementing rules, but those provisions specify a scheme for determining its preemptive effect on state laws and also defer to state law in several areas. In addition, whether the detailed provisions of the HIPAA Privacy Rule is incorporated by itself as a rule implementing the statute has not been ruled on by the courts. See chapter 14, Disclosure of Medical Information. 45 C.F.R. 160.202 & .203. For the most part, federal laws that are not incorporated or duplicated in Washington’s state laws—e.g., the Family Education and Privacy Act, 20 U.S.C. §1232g(b)(1)—are outside the scope of this chapter and will not be addressed here.

Because rules adopted by state agencies must have statutory authority to support their adoption, any provisions found solely in rules should not be given effect to exempt records from disclosure without a specific basis in statute and would not fall within the “other statute” provision. See RCW 34.05.322 (regulations must have statutory authority). However, the Supreme Court determined that Superior Court Civil Rules were equivalent to state statutes because they supersede conflicting laws. *O’Connor v. State Dep’t of Social & Health Servs.*, 143 Wn.2d 895, 910, 25 P.3d 426 (2001). The *O’Connor* court therefore incorporated the court rules into the “other statute” provision of the PRA. *Id.*

### §12.3 REDACTION OF RECORDS EXEMPT UNDER OTHER STATUTES

The question has arisen whether the redaction requirement of RCW 42.17.310(2)/RCW 42.56.210(1) applies to “other statutes” outside the PRA. Agencies are required to make all public records available